No. 17-368

IN THE

Supreme Court of the United States

SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT,

Petitioner,

v.

SOLARCITY CORPORATION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE NATIONAL GOVERNORS ASSOCIATION, NATIONAL CONFERENCE OF STATE LEGISLATURES, COUNCIL OF STATE GOVERNMENTS, NATIONAL ASSOCIATION OF COUNTIES, NATIONAL LEAGUE OF CITIES, U.S. CONFERENCE OF MAYORS, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, AND INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

LISA SORONEN
Executive Director

STATE & LOCAL LEGAL CENTER
444 North Capitol Street, N.W.
Washington, D.C. 20001
(202) 434-4845
lsoronen@sso.org

TILLMAN L. LAY*
KATHARINE M. MAPES
JESSICA R. BELL
AMBER L .MARTIN

**Counsel of Record*
SPIEGEL & MCDIARMID LLP
1875 Eye Street, N.W., Suite 700
Washington, D.C. 20006
(202) 879-4000
tim.lay@spiegelmcd.com

Counsel for Amici Curiae

TABLE OF CONTENTS

	Page
INTEREST OF *AMICI CURIAE*	1
INTRODUCTION AND SUMMARY OF THE ARGUMENT	3
ARGUMENT	5
I. Interlocutory appeal of a district court denial of state-action immunity serves fundamental principles of State sovereignty	5
II. Interlocutory appeal from the denial of state action immunity protects the public interest	8
A. Defending an antitrust lawsuit exposes governmental entities to substantial burden and expense	8
B. The inability to expeditiously appeal an adverse ruling on state-action immunity inhibits the ability of governmental entities to act in the public interest	11
C. Neither State nor local governments should be exposed to antitrust suits based on a perceived error in judgment or disagreement over policy	14
CONCLUSION	16
	19

TABLE OF AUTHORITIES

Page

FEDERAL COURT CASES

Active Disposal, Inc. v. City of Darien, 635 F.3d 883 (7th Cir. 2011) 9

All Am. Cab Co. v. Met. Knoxville Airport Auth., 547 F. Supp. 509 (E.D. Tenn. 1982), *aff'd*, 723 F.2d 908 (6th Cir. 1983) 10

Allright Colo., Inc. v. City & Cty. of Denver, 937 F.2d 1502 (10th Cir.), *cert. denied*, 502 U.S. 983 (1991) 10

Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007) 12, 15

Campbell v. City of Chicago, 823 F.2d 1182 (7th Cir. 1987) 9

City Commc'ns, Inc. v. City of Detroit, 888 F.2d 1081 (6th Cir. 1989) 9

City of Columbia v. Omni Outdoor Advert., Inc., 499 U.S. 365 (1991) 5, 10-11

City of Lafayette v. La. Power & Light Co., 435 U.S. 389 (1978) 1, 5, 6

Cohen v. Beneficial Indust. Loan Corp., 337 U.S. 541 (1949) 4

Cmty. Commc'ns Co. v. City of Boulder, 455 U.S. 40 (1982) 12

Exxon Corp. v. Maryland, 437 U.S. 117 (1978).....11

FERC v. Mississippi, 456 U.S. 742 (1982).....11

Grason Elec. Co. v. Sacramento Mun. Util. Dist., 770 F.2d 833 (9th Cir. 1985), *cert. denied*, 474 U.S. 1103 (1986).....10

Harlow v. Fitzgerald, 457 U.S. 800 (1982).....16

Jacobs, Visconsi & Jacobs, Co. v. City of Lawrence, 927 F.2d 1111 (10th Cir. 1991).....9

Jones v. City of McMinnville, 244 F. App'x 755 (9th Cir.), *cert. denied*, 552 U.S. 890 (2007).....10

Lancaster Cmty. Hosp. v. Antelope Valley Hosp. Dist., 940 F.2d 397 (9th Cir. 1991), *cert. denied*, 502 U.S. 1094 (1992).....13

Martin v. Mem'l Hosp. at Gulfport, 86 F.3d 1391 (5th Cir. 1996)..... 7-8, 12

Mercy-Peninsula Ambulance, Inc. v. San Mateo Cty., 791 F.2d 755 (9th Cir. 1986).....10

Mitchell v. Forsyth, 472 U.S. 511 (1985).....8

Nixon v. Mo. Mun. League, 541 U.S. 125 (2004).....5, 6

Osborn v. Haley, 549 U.S. 225 (2007).....8

Parker v. Brown, 317 U.S. 341 (1943) 1, 4, 5, 6, 11, 17

S. Disposal, Inc. v. Tex. Waste Mgmt., 161 F.3d 1259 (10th Cir. 1998).....9

Scott v. City of Sioux City, 736 F.2d 1207 (8th Cir. 1984), *cert. denied*, 471 U.S. 1003 (1985) 9

Springs Ambulance Serv., Inc. v. City of Rancho Mirage, 745 F.2d 1270 (9th Cir. 1984) 10

State of Tennessee v. FCC, 832 F.3d 597 (6th Cir. 2016) 6

Town of Hallie v. City of Eau Claire, 471 U.S. 34 (1985) 6-7, 17

Will v. Hallock, 546 U.S. 345 (2006) 14

STATE COURT CASES

Miller's Pond Co., LLC v. City of New London, 873 A.2d 965 (Conn. 2005) 7

FEDERAL STATUTES

15 U.S.C. § 15 12

15 U.S.C. § 26 13

Local Government Antitrust Act of 1984, 15 U.S.C. §§ 34-36 11

STATE STATUTES

Ariz. Rev. Stat. Ann. § 30-811 (2017) 7

Ariz. Rev. Stat. Ann. § 30-812 (2017) 7

OTHER AUTHORITIES

130 Cong. Rec. 9554 (1984) 16

130 Cong. Rec. 22,430-36 (1984) 12, 14

C. Paul Rogers III, *Municipal Antitrust Liability in a Federalist System*, 1980 Ariz. St. L.J. 305 (1980) 6

Herbert Hovenkamp & John A. Mackeron III, *Municipal Regulation and Federal Antitrust Policy*, 32 UCLA L. Rev. 719 (1985) 11

John E. Lopatka, *State Action and Municipal Antitrust Immunity: An Economic Approach*, 53 Fordham L. Rev. 23 (1984) 17

Merrick B. Garland, *Antitrust and State Action: Economic Efficiency and the Political Process*, 96 Yale L. J. 486 (1987) 17

Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* (4th ed. 2013) 7, 13

William H. Wagener, *Modeling the Effect of One-Way Fee Shifting on Discovery Abuse in Private Antitrust Litigation*, 78 N.Y.U. L. Rev. 1887 (2003) 15

INTEREST OF *AMICI CURIAE*[1]

Amici curiae are national organizations representing elected and appointed officials of State and local governments. They represent governments and government officials in every State and of all sizes. *Amici* respectfully submit this brief to protect the ability of State and local governments to make decisions and craft policy for the benefit of their citizens, unencumbered by the threat of prolonged and costly antitrust litigation, and in accordance with principles of State sovereignty. *Amici* urge the Court to reverse the Ninth Circuit and find that a district court's denial of state-action immunity to a State or local government entity may be immediately appealed under the collateral order doctrine.[2]

The National Governors Association ("NGA"), founded in 1908, is the collective voice of the Nation's governors. NGA's members are the governors of the 50 States, three territories, and two commonwealths.

---

[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici* represent that they authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than *amici* or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Petitioner and Respondent have consented to the filing of this brief.

[2] The Court first recognized state-action immunity in *Parker v. Brown*, 317 U.S. 341 (1943), applying the doctrine to a State actor. The Court considered whether state-action immunity extends to cities in *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978). In this brief, we use the term "governmental entities" to refer to State and local governments and their agencies, departments, subdivisions, districts, officers, and employees who may face antitrust claims and raise state-action immunity in accordance with the evolution of the doctrine.

The National Conference of State Legislatures ("NCSL") is a bipartisan organization that serves the legislators and staffs of the nation's 50 States, its commonwealths, and its territories. NCSL provides research, technical assistance, and opportunities for policymakers to exchange ideas on the most pressing State issues. NCSL advocates for the interests of State governments before Congress and federal agencies and regularly submits *amicus* briefs to this Court in cases, like this one, that raise issues of vital State concern.

The Council of State Governments ("CSG") is the nation's only organization serving all three branches of State government. CSG is a region-based forum that fosters the exchange of insights and ideas to help State officials shape public policy. This offers unparalleled regional, national, and international opportunities to network, develop leaders, collaborate, and create problem-solving partnerships.

The National Association of Counties ("NACo") is the only national organization that represents county governments in the United States. Founded in 1935, NACo provides essential services to the nation's 3,069 counties through advocacy, education, and research.

The National League of Cities ("NLC") is dedicated to helping city leaders build better communities. NLC is a resource and advocate for 19,000 cities, towns, and villages, representing more than 218 million Americans.

The U.S. Conference of Mayors ("USCM"), founded in 1932, is the official nonpartisan organization of all United States cities with a population of more than 30,000 people, which includes over 1,400 cities. Each city is represented in USCM by its chief elected official, the mayor.

The International City/County Management Association ("ICMA") is a non-profit professional and educational organization consisting of more than 11,000 appointed chief executives and assistants serving cities, counties, towns, and regional entities. ICMA's mission is to create excellence in local governance by advocating and developing the professional management of local governments throughout the world.

The International Municipal Lawyers Association ("IMLA") has been an advocate and resource for local government attorneys since 1935. Owned solely by its more than 2,500 members, IMLA serves as an international clearinghouse for legal information and cooperation on municipal legal matters. IMLA's mission is to advance the responsible development of municipal law through education and advocacy by providing the collective viewpoint of local governments around the country on legal issues before the Supreme Court of the United States, the United States Courts of Appeals, and State supreme and appellate courts.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

State-action immunity recognizes the constitutional importance in our system of federalism of giving governmental entities, responsive to their State and local electorates, sufficient latitude to enact laws, adopt policies, and take actions to promote the public welfare within their jurisdictions, without subjecting those decisions to scrutiny under the federal antitrust law. That law is an inherently ill-suited tool to regulate the conduct of governmental entities. It is also often an inappropriate one. Federal antitrust law can sometimes conflict with the

legitimate public interest objectives served by State law, and this Court made clear in *Parker* that in those cases, federal antitrust law must yield in order to respect those legitimate State law objectives. Subjecting the laws, policies, or actions of governmental entities to antitrust challenge should therefore be the exception, not the rule.

A district court's denial of state-action immunity to a governmental entity should be subject to interlocutory appeal under the collateral order doctrine. *See Cohen v. Beneficial Indust. Loan Corp.*, 337 U.S. 541, 546-47 (1949). Important federalism and policy considerations counsel in favor of allowing aggrieved governmental entities to pursue an interlocutory appeal. *First*, because the extension of state-action immunity to governmental entities is rooted in the State's own sovereign immunity, permitting interlocutory appeal is necessary to respect State sovereignty. *Second*, compelling governmental entities to endure trial court antitrust litigation to final judgment after denial of a state-action immunity motion exposes governmental entities and their taxpaying residents to enormous costs and risks. Those costs and risks will inevitably have a substantial chilling effect on the ability of a governmental entity to fulfill its obligation to promote the public welfare within its jurisdiction. And *third*, due to the checks and safeguards provided by their electoral accountability and transparency requirements, State and local governmental entities simply do not pose the same antitrust risks as private actors.

To give due comity to governmental entities in our system of federalism and to ameliorate the inherent chilling effect antitrust lawsuits may have on governmental entities' public welfare functions, a governmental entity should be permitted to appeal

an adverse district court decision on state-action immunity before being subjected to full trial court litigation on federal antitrust law claims. Accordingly, the judgment of the Ninth Circuit should be reversed.

ARGUMENT

I. Interlocutory appeal of a district court denial of state-action immunity serves fundamental principles of State sovereignty.

The state-action doctrine rests on the firm foundation of State sovereignty. As this Court recognized in *Parker*, "[i]n a dual system of government in which, under the Constitution, the States are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a State's control over its officers and agents is not lightly to be attributed to Congress." *Parker*, 317 U.S. at 351.

The extension of state-action immunity to the activities of political subdivisions of the State derives from the same "principles of federalism and state sovereignty." *City of Columbia v. Omni Outdoor Advert., Inc.*, 499 U.S. 365, 370 (1991). *See City of Lafayette*, 435 U.S. at 415 (recognizing that a municipality's actions implicate issues of State sovereignty when "it is found 'from the authority given a governmental entity to operate in a particular area, that the legislature contemplated the kind of action complained of'" (quoting *City of Lafayette v. La. Power & Light Co.*, 532 F.2d 431, 434 (5th Cir. 1976))). A State's municipal subdivisions "are created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them in its absolute discretion." *Nixon v. Mo. Mun. League*, 541 U.S. 125, 140 (2004) (quoting *Wis. Pub.*

Intervenor v. Mortier, 501 U.S. 597, 607-608 (1991), and citing *Columbus v. Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424, 433 (2002)).

Indeed, "federal interference with local government action may impinge upon the sovereign right of the States to govern, assuming that the challenged activity is judicially determined to be necessary to the autonomy of the State." C. Paul Rogers III, *Municipal Antitrust Liability in a Federalist System*, 1980 Ariz. St. L.J. 305, 333 (1980). For that reason, the Court's "working assumption" is that "federal legislation threatening to trench on the States' arrangements for conducting their own governments should be treated with great skepticism, and read in a way that preserves a State's chosen disposition of its own power." *Nixon*, 541 U.S. at 140.

As the Sixth Circuit recently put it, "[a]ny attempt by the federal government to reorder the decision-making structure of a state and its municipalities trenches on the core sovereignty of that state." *State of Tennessee v. FCC*, 832 F.3d 597, 611 (6th Cir. 2016) (citing *Nixon*). The same principle lies at the heart of the Court's holding in *Parker* that "nothing in the language of the Sherman Act or in its history . . . suggests that its purpose was to restrain a State or its officers or agents from activities directed by its legislature." *Parker*, 317 U.S. at 350-51.

To be sure, non-State governmental entities "do not receive all the federal deference of the States that create them." *City of Lafayette*, 435 U.S. at 412. But the costs and burdens of an erroneous district court denial of state-action immunity to a local government is borne not just by the local government, but also by the State under whose auspices the local government is acting. After all, if the "clear articulation" standard is satisfied, *Town of Hallie v. City of*

Eau Claire, 471 U.S. 34, 43 (1985), it is the State that has authorized the local government's conduct to which state-action immunity adheres.[3]

As a result, whether the antitrust defendant is a State or one of its political subdivisions, compelling a governmental entity to defend an antitrust suit on the merits where that suit is later dismissed on state-action immunity grounds thwarts the State's sovereign authority. Such an antitrust trial impinges upon State sovereignty because, as is discussed in detail below, it has a chilling effect on a governmental entity's actions, forcing it to make decisions based not on its assessment of the public interest, but on the perceived costs and burdens of having that assessment challenged under the federal antitrust laws. Governmental entities faced with lengthy and expensive antitrust trials may find themselves with little choice but to settle, ceasing a challenged action they may have had every right to take. This is litigation at its most coercive, where it constitutes substantial interference with State sovereignty. *See Martin v. Mem'l Hosp. at Gulfport*, 86 F.3d 1391, 1395-96 (5th Cir. 1996) ("One of the primary justifications of state-action immunity is the same as that

---

[3] Additionally, if the local government's conduct is indeed problematic from the State's perspective, States "generally have all the necessary incentives and most generally do in fact provide adequate remedies." Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* ¶ 223 (4th ed. 2013). *See, e.g., Miller's Pond Co., LLC v. City of New London*, 873 A.2d 965, 976, 993 (Conn. 2005) (applying Connecticut statutory version of state-action immunity and concluding that plaintiffs had alleged "anticompetitive conduct well beyond the pale of the statutes"). Here, Arizona law provides clear statutory state court remedies for those who seek to challenge ratemaking decisions. Ariz. Rev. Stat. Ann. §§ 30-811, -812 (2017).

of Eleventh Amendment immunity—'to prevent the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties.'" (quoting *P.R. Aqueduct v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993))).

Allowing interlocutory appeals of denials of state-action immunity thus protects State sovereignty in the same way as the state-action immunity doctrine itself, and is necessary to fulfill the purpose of the state-action doctrine.

II. Interlocutory appeal from the denial of state-action immunity protects the public interest.

Absent interlocutory appeal, the costs and risks of antitrust lawsuits threaten State and local budgets and distort governmental decision-making. *See Osborn v. Haley*, 549 U.S. 225, 238 (2007) (discussing *Cohen* criterion that "the District Court's disposition would be effectively unreviewable later in the litigation" (citing *Cohen*, 337 U.S. at 546)); *Mitchell v. Forsyth*, 472 U.S. 511, 525-26 (1985) (looking at whether a right can "be effectively vindicated after the trial has occurred" (citing *Abney v. United States*, 431 U.S. 651 (1977))).

A. Defending an antitrust lawsuit exposes governmental entities to substantial burden and expense.

Plaintiffs may file antitrust lawsuits against governmental entities for carrying out a wide range of laws, policies, or actions, each of which may be specifically authorized by the State in question and all of which constitute important governmental functions. The end result is that governmental entities face the risk of antitrust suits from a variety of directions, all of which will bring costs and burdens.

Examples of core governmental functions that may make governmental entities a target for antitrust claims include:

- Providing sanitation and sewer services. *See Active Disposal, Inc. v. City of Darien*, 635 F.3d 883 (7th Cir. 2011) (challenging exclusive contracts for collection and disposal of waste); *S. Disposal, Inc. v. Tex. Waste Mgmt.*, 161 F.3d 1259 (10th Cir. 1998) (suit against city and successful bidder on garbage hauling contract);
- Licensing taxi cabs and regulating taxi rates. *See Campbell v. City of Chicago*, 823 F.2d 1182 (7th Cir. 1987) (challenging city ordinance regulating taxicab licenses);
- Regulating land use and zoning. *See Jacobs, Visconsi & Jacobs, Co. v. City of Lawrence*, 927 F.2d 1111 (10th Cir. 1991) (challenging denial of rezoning request); *Scott v. City of Sioux City*, 736 F.2d 1207 (8th Cir. 1984) (challenging restriction of commercial development in outlying areas to promote urban renewal), *cert. denied*, 471 U.S. 1003 (1985);
- Granting franchises to install private commercial facilities in municipal streets and rights-of-way. *See City Commc'ns, Inc. v. City of Detroit*, 888 F.2d 1081 (6th Cir. 1989) (challenging award of a non-exclusive franchise to construct, operate, and maintain cable television system);

- Operating public transportation. *See Allright Colo., Inc. v. City & Cty. of Denver*, 937 F.2d 1502 (10th Cir.) (challenging municipal imposition of fees on commercial operators that exempted city-operated shuttle service), *cert. denied*, 502 U.S. 983 (1991); *All Am. Cab Co. v. Met. Knoxville Airport Auth.*, 547 F. Supp. 509 (E.D. Tenn. 1982) (challenging monopolization of airport ground transportation), *aff'd*, 723 F.2d 908 (6th Cir. 1983);
- Annexing unincorporated territories. *See Jones v. City of McMinnville*, 244 F. App'x 755 (9th Cir.) (challenging city's refusal to annex land and provide services), *cert. denied*, 552 U.S. 890 (2007);
- Lighting streets. *See Grason Elec. Co. v. Sacramento Mun. Util. Dist.*, 770 F.2d 833 (9th Cir. 1985) (challenging public entity's monopoly on market for electrical distribution systems and street and outdoor lighting systems), *cert. denied*, 474 U.S. 1103 (1986); and
- Providing emergency services, such as ambulances. *See Mercy-Peninsula Ambulance, Inc. v. San Mateo Cty.*, 791 F.2d 755 (9th Cir. 1986) (suit against county for granting of exclusive contracts for paramedic services); *Springs Ambulance Serv., Inc. v. City of Rancho Mirage*, 745 F.2d 1270 (9th Cir. 1984) (challenging city ambulance service).

Indeed, most State or local laws, policies or actions inevitably impact private commercial or economic interests in some way. "The fact is that virtu-

ally all regulation benefits some segments of the society and harms others[.]" *Omni Outdoor Advert.*, 499 U.S. at 377. Essentially any State or local regulation that excludes a particular entity from doing business, or even raises its costs of doing business, could be susceptible to challenge as an alleged antitrust violation. *See Exxon Corp. v. Maryland*, 437 U.S. 117, 133 (1978) (describing conflict between state actions and "our 'charter of economic liberty'" (quoting *N. Pac. R. Co. v. U.S.*, 356 U.S. 1, 4 (1958))); Herbert Hovenkamp & John A. Mackeron III, *Municipal Regulation and Federal Antitrust Policy*, 32 UCLA L. Rev. 719, 721 (1985).

Some State and local actions are particularly susceptible to antitrust challenge. The very nature of actions such as the regulation of private commercial use of municipal streets and rights-of-way, or the "quintessential State activity" of "land use [regulation]," *FERC v. Mississippi*, 456 U.S. 742, 768 n.30 (1982), may necessarily impede or restrict private commercial entities' ability to undertake their desired business activities. *See, e.g., Omni Outdoor Advert.* (municipal zoning ordinance restricting billboards immune from antitrust liability under *Parker*). And there may be some areas where governmental entities decide that the public interest is best served by government, rather than private, provision of a service. Governmental entities, then, are placed in the position of having to weigh the performance of basic governmental services and functions against the risk that they will be sued for violation of antitrust laws.

Congress recognized, and ameliorated, some of this potential exposure with the Local Government Antitrust Act of 1984, 15 U.S.C. §§ 34-36 ("LGAA"). The LGAA was a response to the Court's decision in

Community Communications Co. v. City of Boulder, 455 U.S. 40 (1982), which had left municipalities exposed to the risk of treble-damages claims under Section 4 of the Clayton Act, 15 U.S.C. § 15. Congress understood that over 200 antitrust cases had been filed against local governments in just the two short years since *Boulder*. 130 Cong. Rec. 22,436 (1984); *see also id.* at 22,431 (estimating 300 pending cases). In one post-*Boulder* case, a jury awarded a developer $9.5 million in damages against local government entities in a suit where the developer desiring access to a county sewer system alleged that the discretionary denial of its request violated the Sherman Act. *Id.* at 22,433. The damage award, automatically trebled to $28.5 million, represented 6,000 percent of the property tax collected by the village in the prior year. *Id.* Presented with an overwhelming need to address these kinds of antitrust treble-damage awards against local governments, Congress responded in the LGAA by prohibiting them.

To be sure, the LGAA preserved injunctive relief as a remedy for successful plaintiffs in antitrust cases against local governments. But the LGAA nevertheless represents "Congress endors[ing] and expand[ing] the state action doctrine." *Martin*, 86 F.3d at 1397. That is, the LGAA reflects Congress' recognition of the burden antitrust lawsuits place on local governments and the need for a change in judicial course to minimize that burden.

Even after the LGAA, defending antitrust lawsuits poses significant costs and risks on local governments. The cost of defending an antitrust claim in the trial court if state-action immunity is denied is substantial. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 558-60 (2007) (recognizing that "proceeding to antitrust discovery can be expensive"). Often, local

governments must retain costly, specialized outside antitrust counsel to handle these cases, especially if the trial court rejects the state-action doctrine defense and the case proceeds through discovery and even trial. In such cases, a governmental entity's legal defense costs can run into the millions of dollars. Moreover, because the LGAA left intact the possible award of attorney's fees to prevailing plaintiffs in injunctive actions under Section 16 of the Clayton Act, 15 U.S.C. § 26, if an early state-action immunity motion is denied, a governmental entity must also weigh the ongoing, uncertain risk of potential liability for the antitrust plaintiff's attorney's fees. *See Lancaster Cmty. Hosp. v. Antelope Valley Hosp. Dist.*, 940 F.2d 397, 404 n.14 (9th Cir. 1991) (recognizing the possibility that a governmental entity may have to pay costs and attorney's fees to a plaintiff who "substantially prevails" under 15 U.S.C. § 26), *cert. denied*, 502 U.S. 1094 (1992); Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* ¶ 223 (4th ed. 2013). Thus, the combined cost of the governmental entity's own legal fees, plus the risk of fee-shifting if the plaintiff were ultimately to obtain injunctive relief, could easily expose a governmental entity antitrust defendant to monetary liability in the many millions of dollars.

Nor is that the only cost to governmental entities of antitrust litigation. They also face the diversion of limited staff resources and time to the litigation. The combination of these factors means that, absent interlocutory review of denial of state-action immunity, a governmental entity will face substantial additional costs and burdens that can never be undone, even if it is ultimately determined on appeal that the

governmental entity is entitled to state-action immunity.

B. The inability to expeditiously appeal an adverse ruling on state-action immunity inhibits the ability of governmental entities to act in the public interest.

The substantial costs and burdens of antitrust litigation chill the ability of governmental entities to fulfill their primary mission: to respond to the needs and interests of their residents and taxpayers and to promote the public welfare. In ruling that an interlocutory appeal "is not necessary to guarantee meaningful appellate review of an order denying state-action immunity," Pet. App. 11a n.4, the Court of Appeals failed to appreciate this critical consideration. The chilling effect of antitrust litigation will, in fact, push many governmental entities to settle, negating meaningful appellate review in many cases.

The collateral order doctrine protects "not mere[ly the] avoidance of a trial, but avoidance of a trial that would imperil a substantial public interest." *Will v. Hallock*, 546 U.S. 345, 353 (2006). Denying governmental entities the ability to expeditiously appeal an adverse ruling on state-action immunity threatens their ability to serve the public interest as they see fit. Indeed, "[t]he mere threat of an antitrust lawsuit can divert elected officials from a course of action they believe would best serve the public interest." 130 Cong. Rec. 22,430 (1984).

In addition to influencing governmental entities' actions before litigation occurs, the inability of such entities to seek immediate appellate review of the denial of state-action immunity may effectively coerce them into settlements contrary to the public interest. A governmental entity may well find it better, following a trial court's denial of state-action

immunity, to settle a case rather than endure the substantial costs and risks of ongoing trial court antitrust litigation. *See Twombly*, 550 U.S. at 559 (noting that "the threat of discovery expense will push cost-conscious defendants to settle even anemic cases before reaching those proceedings"). As one commentator has noted, "Once [an antitrust] claim has survived a motion to dismiss, a plaintiff often can credibly threaten to impose significant costs on the defendant through wide-reaching discovery." William H. Wagener, *Modeling the Effect of One-Way Fee Shifting on Discovery Abuse in Private Antitrust Litigation*, 78 N.Y.U. L. Rev. 1887, 1889 (2003).

To avoid substantial cost exposure to its taxpayers, a governmental entity might settle the case with a stipulated injunction prohibiting the enforcement of the ordinance, policy, or action at issue, plus perhaps a monetary payment to plaintiff in settlement of plaintiff's potential attorney's fees claims. Thus, the LGAA notwithstanding, the costs and uncertainties of litigating an antitrust suit without interlocutory appeal could force a governmental entity to forfeit the public interest that would have been served by the challenged action—even where, on appeal, plaintiff's claim ultimately might well have been found to have been barred by the state-action doctrine.

In other words, failure to permit interlocutory appeal can render the district court's denial of state-action immunity effectively unreviewable. It also would undermine an important public interest—a governmental entity's ability to achieve legitimate public policies, as authorized by the sovereign State under whose auspices the governmental entity was formed.

The result is the distortion of State and local governments' decision-making processes. And that distortion arises directly from the failure to allow governmental entities to appeal immediately a district court's adverse decision on state-action immunity.

This Court has long recognized that "where an official's duties legitimately require action in which clearly established rights are not implicated, the public interest may be better served by action taken with independence and without fear of consequences." *Harlow v. Fitzgerald*, 457 U.S. 800, 819 (1982) (quotation marks omitted) (quoting *Pierson v. Ray*, 386 U.S. 547, 554 (1967)). Congress has likewise expressed its concerns over the chilling effect that potential antitrust liability has on State and local governments' decision-making:

> With [*Boulder*], [a] dark cloud of uncertainty descended over local governments and cast a deep shadow over the validity of almost every municipal action, including those actions which are clearly legitimate governmental functions . . . necessary for the well-being of the public.

130 Cong. Rec. 9554 (1984). This "dark cloud" will persist so long as governmental entities face the prospect of lengthy antitrust discovery and trial on the merits before they can find out whether they are protected by state-action immunity.

C. Neither State nor local governments should be exposed to antitrust suits based on a perceived error in judgment or disagreement over policy.

Unlike private, profit-maximizing entities, State and local governmental entities are charged with

promoting consumer welfare and are subject to democratic self-correction by their electorates. *See* John E. Lopatka, *State Action and Municipal Antitrust Immunity: An Economic Approach*, 53 Fordham L. Rev. 23, 58 (1984). And also unlike private sector entities, State and local governments are subject to open meeting and open records laws, further protecting against abuse. *See Town of Hallie*, 471 U.S. at 45 n.9 (noting that municipalities are often "subject to 'sunshine' laws or other mandatory disclosure regulations, and municipal officers, unlike corporate heads, are checked to some degree through the electoral process"). As the Court has explained:

> Where the actor is a municipality, there is little or no danger that it is involved in a *private* price-fixing arrangement. The only real danger is that it will seek to further purely parochial public interests at the expense of more overriding State goals. This danger is minimal, however, because of the requirement that the municipality act pursuant to a clearly articulated State policy.

Id. at 47.

Moreover, state-action immunity rests on the premise that the Sherman Act was not "intended to restrain state action or official action directed by a state," but instead "must be taken to be a prohibition of individual and not state action." *Parker*, 317 U.S. at 351, 352. For that reason, "[t]he judiciary should not interfere under the aegis of the antitrust laws with a state's political decision, however misguided it may be, to substitute regulation for the operation of the market." Merrick B. Garland, *Antitrust and State Action: Economic Efficiency and the Political Process*, 96 Yale L. J. 486, 487-88 (1987).

These inherent differences between governmental and private sector actors present very different concerns and risks under the antitrust laws in general, and the state-action doctrine in particular. Compelling State and local governmental entities to endure the substantial costs and risks of trial court antitrust litigation rather than permitting an immediate appeal of a trial court's adverse state-action doctrine decision has the inherent, and undemocratic, result of chilling State and local governments' decision-making, driving them to avoid enacting policies that might otherwise further legitimate public interests. The only way to avoid this chilling effect is to permit interlocutory appeals of trial court denials of state-action immunity.

CONCLUSION

The Court should reverse the judgment below.

Respectfully submitted,

LISA SORONEN
Executive Director

STATE & LOCAL
LEGAL CENTER
444 North Capitol
Street, N.W.
Washington, D.C. 20001
(202) 434-4845
lsoronen@sso.org

TILLMAN L. LAY*
KATHARINE M. MAPES
JESSICA R. BELL
AMBER L. MARTIN

**Counsel of Record*
SPIEGEL & MCDIARMID LLP
1875 Eye Street, N.W.
Suite 700
Washington, D.C. 20006
(202) 879-4000
tim.lay@spiegelmcd.com

January 22, 2018